

रजिस्ट्रार नं० पी०/एस० एच० 14.



राजपत्र, हिमाचल प्रदेश (प्रसाधारण)

हिमाचल प्रदेश राजपत्र द्वारा प्रकाशित

शिमला, शनिवार, 5 जुलाई, 1986/14 चैत्र, 1908

हिमाचल प्रदेश सरकार

ELECTION DEPARTMENT

NOTIFICATION

Shimla-171002, the 16th April, 1986

No. 3-7/86-Eln.—The Election Commission of India's Notification No. 82/HP-LA/7/85, dated the 2nd April, 1986 corresponding to Chaitra 12, 1908 (Saka), containing the Judgement dated the 3rd March, 1986 of the High Court of Himachal Pradesh at Shimla in Election Petition No. 7 of 1985 is hereby published for general information.

By order,
ATTAR SINGH,
Chief Electoral Officer,
Himachal Pradesh.

भारत निर्वाचन आयोग

निर्वाचन सदन,
अशोक मार्ग,
नई दिल्ली-110001.
2 अप्रैल, 1986.

तारीख—
चैत्र 12, 1908 (शक्)

अधिसूचना

संख्या 82/हि०प्र०-वि०स०/7/85.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, निर्वाचन आयोग 1985 की निर्वाचन अर्जी संख्या 7 में उच्च न्यायालय, हिमाचल प्रदेश, शिमला के तारीख 3 मार्च, 1986 का निर्णय एतद्वारा प्रकाशित करता है।

ELECTION COMMISSION OF INDIA

*Nirvachan Sadan,
Ashok Road,
New Delhi-110001,*

April 2, 1986
Dated—
Chaitra 12, 1908 (Saka)

NOTIFICATION

No. 82/HP-IA/7/85.—In pursuance of section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission hereby publishes the Judgement dated the 3rd March, 1986 of the High Court of Himachal Pradesh, Shimla, in Election Petition No. 7 of 1985.

V. P. Gupta, J.

"The Himachal Pradesh Legislative Assembly was dissolved on 23-1-1985 and in pursuance to a notification dated 1-2-1985, fresh elections were held on 5-3-1985 for 7-Theog Assembly constituency of Himachal Pradesh. The parties and one Shri Tulsi Ram (covering candidate of Janata party) filed their nomination papers. Shri Tulsi Ram subsequently withdraw his nomination papers on 11-2-1985. The petitioner and the respondent thus were the only candidates in this election of 7—Theog Assembly constituency.

According to the election programme (Ex.P-15), the last date for filing the nomination papers was 8-2-1985, for scrutiny of nomination papers was 9-2-1985 and for withdrawal of candidates was 11-2-1985. The polling was to be held on 5-3-1985 and the elections were to be completed by 9-3-1985.

The counting of votes took place on 6-3-1985 and the results were also declared on 6-3-1985. The respondent was declared elected having secured 13,941 votes, while the petitioner secured 10,416 votes only. 168 votes were declared as invalid out of the polled votes.

On 9-2-1985 at the time of the scrutiny of the nomination papers, the petitioner filed objections and claimed that the respondent was holding an office of profit as Vice-Chairman of the Horticulture Produce Marketing and Processing Corporation, Shimla (hereinafter the HPMC) and her nomination was directly hit by section 10 of the Representation of People Act, 1951 (hereinafter the Act). After holding a summary enquiry, the Returning Officer rejected the objections of the petitioner by his order dated 9-2-1985 (Ex. PG).

After being declared elected, the respondent was elected as a Speaker of the Himachal Pradesh Vidhan Sabha.

The petitioner has now filed this election petition under sections 80, 84, 81, 97, 100 (1) (a) and 101 of the Act challenging the election of the respondent on the grounds that the respondent was holding an office of profit and was disqualified for contesting the election. The respondent was a Director and Vice-Chairman of the HPMC and was functioning as such. The respondent was also an agent of the HPMC which is a Government company and was managing the whole or substantially the whole affairs of the HPMC as a defecto managing agent or manager.

The respondent in her written statement has controverted the various allegations and has alleged that she was not holding an office of profit under the Government of India or the Government of any State. She ceased to be the Vice-Chairman of HPMC after 14-11-1984 and never functioned as a Vice-Chairman after this date. It is however, admitted that she was holding the office of Director of HPMC, but it was not an office of profit. The Directorship of HPMC is not an office of profit under the State Government within the meaning of Article 191 of the Constitution of India (hereinafter the Constitution). The respondent admits that she was a State Minister for Rural Development but was entitled to contest the elections. It is further alleged by the respondent that she never derived any profit from the office of the Vice-Chairman or the Director and at the relevant time no disqualification was attached to her for contesting the election.

Preliminary objections regarding the verification of the petition, filing of the affidavit, maintainability of the petition with respect to the challenging of the vires of the Himachal Pradesh Legislative Assembly Members (Removal of Disqualification) Act, 1971 (hereinafter the H. P. Act of 1971) as also the non-disclosure of a cause of action were also raised.

The other allegations made in the petition are also denied.

Replication was filed by the petitioner and in the replication the petitioner has re-asserted the various allegations made in the petition and has controverted the allegations of the respondent.

On the pleadings of the parties, the following issues were framed on 17-6-1985:—

1. Whether the election petition is properly verified?OPP
2. Whether para No. 11 (m) of the election petition is liable to be struck off, as alleged? OPR
3. Whether the validity of the Himachal Pradesh Legislative Assembly Members (Removal of Disqualifications) Act, 1971 can be called into question in the election petition?OPP
4. Whether the respondent was holding an office of profit under the State as alleged?OPP
5. Whether the respondent was disqualified for contesting the election to the Himachal Pradesh Vidhan Sabha for the various reasons mentioned in para 11 of the election petition?OPP
6. Relief.

The parties led evidence on the various issues and I have heard the learned counsel for the parties. My findings on the various issues are as follows:

Issue No. 1:

The petitioner filed an application (E.M.P. No. 10 of 1985) seeking amendment of the petition for the purposes of verification. This application was allowed on 11-7-1985 and the learned counsel

for the respondent waived the objection regarding the verification. This issue was accordingly struck off *vide* my order dated 11-7-1985.

Issue No. 2:

Some evidence was recorded on this issue. During the arguments the learned counsel for the respondent did not press this issue on the grounds that the evidence regarding averments in para 11(m) of the petition was inadequate. This issue is, therefore, decided against the respondent.

Issue No. 3:

The learned counsel for the petitioner frankly and rightly admitted that the validity of the H.P. Act of 1971 cannot be called into question in this petition. In view of the above situation the present issue is decided against the petitioner.

Issues Nos. 4 and 5:

Both these issues are inter-linked and can conveniently be decided together. The learned counsel for the parties also prayed that both the issues be decided together because same evidence is to be discussed for the decision of these issues. In these circumstances, I am discussing both these issues together.

The learned counsel for the petitioner contended that the respondent was holding an office of profit and was the director as well as the Vice-Chairman of HPMC on the relevant date. It was further contended that she was a managing agent of the HPMC. The contention was that although her term as a Vice-Chairman expired on 14-11-1984, but she continued to act as a *defecto* Vice-Chairman for all purposes. Regarding her position as a Director on the relevant date, there was no contest. The learned counsel contended that the respondent was a managing agent of HPMC and her various activities were sufficient to prove this position. She was thus disqualified under section 10 of the Act from contesting the elections. Reliance was placed on Article 191 of the Constitution, section 2(a) read with section 3(m) of the H.P. Act of 1971 and section 2(25) of the Indian Companies Act. The learned counsel also relied upon Articles 129 and 131 of the Memorandum and Articles of Association of HPMC (Ex.P-1).

The learned counsel for the respondent contended that the respondent was not a Vice-Chairman on the relevant date and to be a director or Vice-Chairman of HPMC was not a disqualification under Article 191 of the Constitution. Section 10 of the Act was not applicable because the respondent was not a managing agent of HPMC. It was also contended that the respondent was not getting any profit from the office of Director or Vice-Chairman and was in fact not holding any office of profit in the HPMC. It was contended that the respondent was not disqualified from contesting the elections according to the Memorandum and Articles of Association of HPMC or according to the provisions of the Act or the H.P. Act of 1971 and the Constitution.

The oral and documentary evidence was also read out in the Court.

The HPMC is a registered company under the Companies Act and is a Government concern. It is a subsidiary company of the Agro-Industries Corporation of Himachal Pradesh. The Governor of Himachal Pradesh, in exercise of the powers vested in him under Article 128(a) of the Memorandum and Articles of Association of HPMC (Ex.P-1) appointed the respondent as a Director on the Board of Directors of the HPMC vide notification No. 38-49/74-Hort.(Secretariat) dated 30-10-1980 (Annexure PH). It is an admitted position that the respondent was a Director of HPMC on 8-2-1985 (the date of filing the nomination papers) and was also a director on 6-3-1985 (the date when the result was declared). She was appointed Vice-Chairman of HPMC initially with effect from 15-11-1980 for a period of three years. The period of three years expired on 14-11-1983 but subsequently this term as Vice-Chairman was extended for a period of one year and as such she remained a Vice-Chairman of HPMC till 14-11-1984. After

14-11-1984 the term of the respondent as a Vice-Chairman was not extended and she ceased to be a Vice-Chairman after this date. The respondent thus was vice-Chairman from 15-11-1980 till 14-11-1984 without any break as is disclosed by Shri B. C. Negi (PW 1) and therefore, on the date of filing the nomination papers or during the elections she was not holding this office. The learned counsel for the petitioner also frankly and rightly admitted that the respondent was not a de jure Vice-Chairman of HPMC on the relevant date. This fact is also admitted in para 11(a) of the replication filed by the petitioner where in she admits that the term of the office of the respondent as Vice-Chairman expired on 14-11-1984.

The petitioner's counsel contended that the respondent was a defecto Vice-Chairman and in this case she should be considered a de jure Vice-Chairman. He referred to the new years greeting cards (Ex.P-5 and P-6).

The respondent (RW-1) states that she never asked the HPMC department to issue the new years greeting cards showing her as a Vice-Chairman and the aforesaid greeting cards must have been published in September, October, 1984 and the same must have been issued as is the practice and routine with the various departments. This part of her statement was not challenged in the cross-examination. The petitioner also did not ask any question from the respondent (RW-1) as to when she signed the greeting cards. The respondent states that she did not notice the fact of her having been described as a Vice-Chairman and therefore, she did not point out this wrong description to the HPMC people. Shri Srikant Srinivas (PW 3) also states that the greeting cards of the nature of Ex. P-5 and P-6 were issued from the office of HPMC and the work of publication of such cards starts in the month of October and such cards were got printed in October, 1984. Hence the signing of the new year greeting cards Ex.P-5 and P-6 by the respondent is not sufficient to prove that she was a defecto Vice-Chairman on the date of filing the nomination papers or the declaration of the election results.

The next document relied upon by the petitioner's counsel is a report in the newspaper "The Hindu" dated 16-1-1985 (Ex. P-18) The title of the item Ex.P-18 is "Apple disease under Control" and the news is dated 15-1-1985 from Madras. In the first part of this news item the respondent is described as Mrs. Vidya Stokes, Himachal Pradesh Minister for Rural Development but in the middle it is mentioned as "Mrs. Vidya Stokes who is also the Vice-Chairman of HPMC highlighted the role of her organisation in encouraging small farmers....." It was contended that the respondent was defecto Vice-Chairman. The respondent (RW 1) states that she had gone to Madras and Bangalore in January, 1985 in her capacity as a Minister of State for Rural Development, Himachal Pradesh. During this visit she was invited by the persons of "The Hindu" newspaper for evening tea, as she was a Minister of State for Rural Development and an owner of some apple Orchards. Some questions were asked from her during this meeting over a cup of tea, but she never disclosed herself to be a Vice-Chairman. These persons never enquired from her about her status as Vice-Chairman. She admits that Shri S. N. Sankhyan the Branch Manager of Madras Branch of HPMC was with her during this visit and as a Minister incharge for Rural Development she was expected to look into the affairs of Himachal Pradesh concerns in any of the States of the country or abroad in the public interest. In Ex.P-18 basically she has been mentioned as a Minister of State for Rural Development Himachal Pradesh and the remaining part is an assumption of the newspaper. Her visit to Madras and Bangalore was not sponsored by the HPMC and the expenditure for this visit was not borne by the HPMC.

The news item (Ex. P-18) does not suggest that the respondent ever disclosed herself to be a Vice-Chairman of HPMC. The mere production of the news item cannot prove or establish the correctness of the news item.

In A.I.R. 1969 S.C. 1201, (*Samant N. Balakrishana Vs: George Fernandez and others*) it has been observed in para 47 of the judgment that "A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand secondary evidence. It is well known fact that reporters collect information and pass it on to the Editor who edits

the news item and then publishes it. In this process the truth might get perverted or garbled. Such news item cannot be said to prove themselves although they may be taken into account along with other evidence if the other evidence is forcible."

Due to the non-production of Shri S. N. Sankhyan or the person who collected the information, it is not safe to rely upon the newspaper item Ex. P-18, describing the respondent as a Vice-Chairman at one place and it can not be held that the respondent was a defecto Vice-Chairman.

The next document is the press note (Ex. P-7) issued on 2-1-1985, wherein the respondent has been described as a Vice-Chairman of HPMC. This press note refers to a resolution passed in a meeting of the HPMC held recently. This meeting (referred to in Ex. P-7) was held on 31-12-1984 and was presided over by respondent after 14-11-1984. In the absence of the Chairman, being a Director of the HPMC, she presided over this meeting and was described as a person-in-chair. A photostat copy of the minutes of this meeting (Ex. P-16) is on record. The respondent having been described as a person-in-chair in Ex. P-16, her description as Vice-Chairman in the press note Ex. P-7 is patently incorrect.

The other documents referred are Ex. P-19, P-19-A and P-20. Ex. P-19 is the copy of a letter from Shri S.N. Sankhyan and the subject in this letter is "Vice-Chairman's visit to Madras". Shri S. N. Sankhyan has forwarded a press cutting of the news paper "The Hindu", copy of which is Ex. P-18, to Shri S.W. Mehta, Chief (Marketing) HPMC Shimla (PW 11). The contents of Ex. P-20 and P-19 are the same. Shri S.W. Mehta (PW 11) states that the original letter of Shri S.N. Sankhyan should have been available with him but after the receipt of the summons he found that the letter was not traceable. Therefore, he issued a telegram to the Branch Manager of HPMC Madras and in response to the telegram the Branch Manager sent a typed copy (Ex. P-19) of the letter. Ex. P-19/A is an enclosing letter dated 25-10-1985 sent by Shri S.N. Sankhyan to Shri S.W. Mehta (PW 11). Ex. P-20 shows that the letter was signed by Shri S.N. Sankhyan on 2-3-1985 in the encircled portion marked 'A' on Ex. P-20. It was despatched from Madras on 28-2-1985 as is evident from the encircled portion marked 'B' in Ex. P-20 and was received at Shimla on 11-3-1985 as is evident from the encircled portion marked 'C' in Ex. P-20.

Shri S.W. Mehta (PW 11) also states that in the normal course his signatures should have been available on Ex. P-20 after receipt of the letter, but Ex. P-20 does not show his initials and there is also no further marking to the concerned branch. He further states that he never received the press cutting (Ex. P-18). He has narrated the whole procedure regarding receipt and diarising of the letters. The documents Ex. P-19, P-19/A and P-20 are not material but it is proved that the news item (Ex. P-18) was not received in the office of HPMC at Shimla. It is also not understood as to why the cutting of the news item (Ex. P-18) was despatched with a letter signed by Shri S.N. Sankhyan on 2-3-1985. The news pertained to a meeting held on 15-1-1985 and if the office persons of HPMC were vigilant then such a news item published in the news paper dated 16-1-1985 should have been sent in the month of January, 1985 and not later. These documents do not advance the case of the petitioner further specially when Shri S.N. Sankhyan has not been produced.

The aforesaid discussion thus shows that the petitioner has failed to prove that the respondent was acting as a defecto Vice-Chairman after 14-11-1984.

The solitary statement of the petitioner on this aspect cannot be accepted when the respondent has categorically stated that she was not acting as a defecto Vice-Chairman of HPMC after 14-11-1984.

As the respondent has not been proved to be a defecto or de jure Vice-Chairman on the date of the filing of the nomination papers or their scrutiny or during elections, therefore, it cannot be said that the respondent was holding an office of Vice-Chairman of HPMC on the relevant date.

The respondent after having been appointed as a Director was appointed as a Vice-Chairman of HPMC vide notification dated 2-1-1981 (Ex. R-4) (English translation at page 95 Annexure PK).

By notification dated 25-3-1982 (Ex. R-5) (English translation at page 96 Annexure PL), her appointment as a Vice Chairman was on honorary basis. She could in connection with the business of the HPMC receive only T.A. and D.A. By notification dated 11-4-1984 (Ex. R-6) this term was only extended for a period of one year with effect from 15-11-1983. No other terms and conditions of her appointment were made in this notification. The term expired automatically on 14-11-1984 because the appointment as Vice Chairman was for a fixed period. Except for the terms and conditions available in Ex. R-5, that is, the appointment of the respondent as Vice-Chairman, no other terms and conditions have been proved on record.

The respondent (RW-1) states that she remained a Vice Chairman of HPMC in an honorary capacity till 14-11-1984 and was entitled to a free telephone facility in her capacity as Vice-Chairman of HPMC. She enjoyed this facility during the period when she remained the Vice-Chairman of HPMC. Shri S. R. Singh (PW 12) also states that telephone No. 385018 was installed at Delhi in the name of the respondent in 1982 as a temporary line which was subsequently converted into a permanent line in September, 1983. It is not denied that the respondent was a Vice-Chairman in 1982 and 1983. It is in evidence that the aforesaid telephone was installed in room No. 206 of Curzon Road Guest House, which room was being used by the respondent whenever she was in Delhi. The keys of room No. 206 remained with the receptionist and its ownership was not of the respondent. The other officers of the HPMC could also use and used the telephone and the keys of the telephone also remained in the guest house. It is admitted that there was no restriction on the calls and the telephone bills used to be paid by HPMC during the period when the respondent remained the Vice Chairman. Shri S. R. Singh (PW 12) also states that the bills of the telephone were being paid by HPMC.

These facts, however, are not sufficient to prove that the telephone at Delhi was installed by the HPMC. The respondent (RW 1) states that she got the telephone installed when she was the Administrator for Shivaji Stadium during Asiad 1982 games and was staying in room No. 206 of the Curzon Road Guest House. She also states that the telephone was installed in her personal name during the Asiad games and at a subsequent stage the HPMC people requested her for the use of the telephone allotted in her name till the time she remained the Vice Chairman of the HPMC.

The petitioner could falsify the statements of Shri S. R. Singh (PW 12) and respondent (RW-1) by producing the record of the telephone authorities who installed the telephone and could prove that the telephone was installed upon the application of the HPMC. The records pertaining to this telephone were summoned in Court but the petitioner did not care to produce the relevant records with respect to the expenditure incurred by HPMC on the installation of the telephone. In the absence of such evidence the irresistible conclusion is that the telephone was installed in the personal name of the respondent and at her personal expenses. The respondent and Shri S.R. Singh (PW 12) also state that after 14-11-1984 the bills of the telephone were paid by the respondent.

The mere fact that the telephone is installed in a guest house and that the room in which the telephone is installed is not in the exclusive control of the respondent or that persons other than the respondent were using the telephone is not sufficient to prove that the respondent was enjoying the telephone facility at the cost of HPMC even after 14-11-1984.

A statement (Ex. PW 5/A) giving the details of T.A./D.A. paid to the respondent has also been produced by Shri B. K. Sharma (PW 5) Accounts Officer HPMC. This statement shows that the respondent was paid various amounts from 13-12-1981 to 29-3-1985. The last payment of 29-3-1985 refers to a voucher No. 2009, for the period 6-4-1984 to 9-4-1984. Earlier to this last payment is the payment dated 22-5-1984 vide voucher No. 228 pertaining to the period 26-3-1984 to 2-4-1984. Hence the last payment made to the respondent pertained to a period from 6-4-1984 to 9-4-1984 although the voucher No. 2009, seems to have been prepared on 29-3-1985. Shri B. K. Sharma (PW 5) states that the payment made on 29-3-1985 shown in encircled portion 'A' of Ex. PW 5/A was only an adjustment of the amount and actual payment was not made to the respondent. This was done because the bill from 6-4-1984 to 17-4-1984 was submitted in November 1984. Shri B. K. Sharma (PW 5) also states that the last payment for the telephone was made on 15-12-1984 and the

In view of the above discussion it cannot be held that the respondent was occupying the status of a Vice-Chairman of HPMC on 8-2-1985 or during the elections.

The HPMC is owned and controlled by the Government and if any remuneration/salary is to be paid or fixed for payment to the directors then the same could be fixed by a resolution of the Board of Directors. The petitioner has not proved any such document. The factual position therefore, is that the respondent was only a director of the HPMC on the relevant dates and was getting T.A. and D.A. only. No remuneration was fixed or paid to her.

Section 3 (m) reads as follows:

(m) the office of Chairman or Vice-Chairman director or member of any statutory body other than any such body as is referred to in clause (l) if the holder of such office is not entitled to any remuneration other than compensatory allowance;

Section 2 (a) of the Act of 1971 reads as follows.

“(a) “compensatory allowance” means such sum of money as the Government may determine as being payable to the holder of an office by way of travelling allowance, daily allowance, sitting allowance, conveyance allowance or house rent allowance for the purpose of enabling him to recoup any expenditure incurred by him in performing the functions of the office.”

The definition of compensatory allowance as given in section 2 (a) allows a director to charge TA and DA besides certain other allowances. This payment by itself does not disqualify a director from contesting the elections. No remuneration was paid to the respondent and no remuneration had been fixed for payment.

The learned counsel for the petitioner also referred to various articles of Association of HPMC (Ex. P I) in support of his contentions.

Article 1 (d) defines a Vice-Chairman as “Vice-Chairman shall mean a Chairman of the Board of Directors for the time being of the Company.”

Article 1 (g) defines director and reads:

“Director shall mean the Director for the time being of the Company and includes an ex-officio Director”.

Article 128 deals with the number of directors and according to this article a board shall be composed of 15 directors of which 8 shall be appointed by the holding company, five by the Government including the Chairman and the representative of the department of finance, public works, horticulture and Agriculture production, and one by the Himachal Pradesh Fruit Development Board: the Managing director shall be a member of the Board. The directors shall not be required to hold any qualification.

Article 129 deals with remuneration and reads as follows:—

“129. Remuneration. (a) The Directors shall be paid such remuneration/travelling allowance as the Board shall decide (subject to the provision of section 314 of the Act such reasonable additional remuneration as may be fixed by the Corporation may be paid to any one or more of the Director or extra or special services rendered by him or them.)

(b)	x	x	x	x	x
(c)	x	x	x	x	x

(d) Notwithstanding anything contained in these Articles. if a member of the State Legislative Assembly or Parliament is appointed as Director, he shall not be paid any salary, but he shall be paid travelling allowance and such other allowance which may be payable to him in attending the meeting of the Board or its committee or in performing any other functions as the Director, as the case may be.

Article 131 (b) deals with a Vice-Chairman of the Board and reads as follows:—

“131. (b) Vice-Chairman of the Board—The Himachal Pradesh Government may appoint one of the Directors to be the Vice-Chairman of the Board in consultation with holding Company, if need be.”

The contention of the petitioner's counsel was that the directors are entitled to got remuneration/TA in accordance with the decision of the Board and the Board has to decide about the fixation of remuneration/TA. It was contended that the Board of Directors was duly bound to decide the remuneration and fix the same for payment to the Directors. It was also contended that the directors have a right to claim remuneration and were entitled to remuneration and the mere fact that

the director voluntarily relinquish their claim to remuneration did not mean that they were not entitled to remuneration. The actual payment of remuneration was not necessary and mere entitlement to remuneration made the office of a director as an office of profit. The respondent was thus not entitled to contest the elections.

Now Article 129 of the Articles of Association (Ex.P-1) only states that the Directors shall be paid such remuneration as the Board shall decide. It is, therefore, only the Board of Directors which can decide about the payment of remuneration to the directors. If the Board fails to fix any remuneration then in that case the directors cannot claim and are not entitled to any remuneration. Even if the Board of Directors fix a remuneration for payment to the directors, it will be open to the directors to accept payment of remuneration or to refuse to remain a director on payment of remuneration fixed by the Board.

In AIR 1975 S.C. 1068 **Diyya (Parkash vs. Kultar Chand Rana)** it has been observed in para 4 of the Judgement that the test for deciding as to whether a person holds an office of profit is very simple. It is whether he can for or otherwise claim the scale of pay fixed by the resolution of the Board.

Applying this test it cannot be held that the present respondent could sue for or claim remuneration from the HPMC because the Board has not fixed any remuneration. In the alternative also, if the Board had fixed any remuneration then too it was the opinion of the person to accept the directorship on payment of remuneration or not. The obligation would be a contractual and bilateral one. For example, the Board had appointed the respondent as a Director on payment of remuneration then before filing the nomination papers it was always open to the respondent to have resigned from the office of directorship. The mere fact that the word "shall" has been used does not mean that the respondent was entitled to the remuneration if non has been fixed by the Board of directors.

In the case of **Divya Prakash (supra)**, the facts were that Rana Kultar Chand was declared elected as a member of the Himachal Pradesh Legislative Assembly from Shahpur constituency in Kangra district during the elections held in March 1972. His election was challenged on the ground that at the time of filing of the nomination papers he was holding an office of profit being the Chairman of the Board of School Education of Himachal Pradesh. As a Chairman he was allowed an official car, a house, a driver and a peon. The contention was that the office of Chairman was an office of profit. A learned Single Judge of this High Court in ILR 1973 HP 670, (**Divya Prakash Vs. Kultar Chand Rana**) held that the grant of a car and a house would not amount to an office of profit as the Chairman was entitled to conveyance and house rent allowance in lieu thereof and this was covered and protected by the definition of compensatory allowance as given under section 3(m) of the Himachal Pradesh Act of 1971. Regarding chauffeur and a peon, the same was held to be immaterial in view of the fact that the chauffeur was a necessary appendage with the car and was placed at the disposal of the Chairman and the peon was necessary to maintain the house. The learned Judge further held that the regulations of the Board fixing the remuneration or salary of the Chairman were without lawful authority and such a resolution was a dead letter giving no enforceable cause of action to the Chairman who had contracted the act in an honorary capacity. An appeal was filed in the Supreme Court by Shri Divya Parkash. In appeal it was contended that Rana Kultar Chand Chairman of the Board was holding an office of profit under the State Government and was disqualified under Article 191 (1)(a) of the Constitution. The Hon'ble Judges of the supreme court in AIR 1975 S.C. 1068 (supra) held that Rana Kultar Chand was appointed to the post of a Chairman in an honorary capacity and was entitled to receive travelling and daily allowance in the course of the discharge of his duties as a Chairman and in these circumstances, he was not disqualified from contesting the elections in view of the provisions of section 3(m) of the Act of 1971. It was also contended that the post itself carried a scale of pay and, therefore it was an office of profit although Rana Kultar Chand might not have been receiving the salary. The Supreme Court held that the question as to whether the holding of the office has resulted in any profit to the holder of

that office, however small that profit may be, had been discussed in AIR 1975 S.C. 575 *Karbhari Bhimaji Rohamare Vs. Shanker Rao Genuji Kolhe and other*) and that in the absence of any profit accruing as a result of the holding of the office of Chairman it cannot be said that he was holding an office of profit. The order of appointment itself was one made in an honorary capacity. The Supreme Court further held that the School Education Board had no authority to fix the scale of pay of the Chairman by a resolution and therefore, it could not be said the post of Chairman carried with it a scale of pay, (Emphasis supplied).

In AIR 1969 S. C. 262 (*Umrao Singh Vs. Darbara Singh and others*) the Chairman of a Panchayat Samiti was a successful candidate. He was paid Rs. 100/- a month as a consolidated allowance for performing official duties and journeys concerning the Panchayat Samitis within the district including attending of meetings, supervision of plans, projects, schemes and other works and also for discharge of other lawful obligations and implementation of government directives. He was also granted mileage and daily allowance for journeys performed for any official work outside the district and the daily allowance was payable at the rate of Rs. 6/- per day.

The Supreme Court held that the consolidate allowance was not salary/remuneration or honorarium but was an allowance paid for the purpose of ensuring that the Chairman of the Panchayat Samiti did not have to spend money out of his own pocket. It further held that the burden lay upon the appellant to give evidence on the basis of which a finding could have been arrived at that the amount of Rs. 100/- per month was excessive and was not required to compensate the Chairman for the expenses incurred by him in discharge of his official duties. The Court finally found that the appellant had failed to establish that the allowances payable resulted in any pecuniary gain to the Chairman. The main purport of the decision is that whether what was received by the member was in excess of the expenditure which he would have to incur for the purpose of performing the journeys in order to discharge his official duties, the burden being on those who allege it.

This judgment was delivered in an appeal filed against the judgment of the Punjab and Haryana High Court in AIR 1968 P & H 450 (*S. Umrao Singh Vs. Darbara Singh and others*) wherein a Full Bench of the High Court has observed that the payment of Rs. 100/- per month was not the profit earned by the Chairman but was compensation simpliciter for out of pocket expenses and in these circumstances, it was held that the Chairman of the Panchayat Samiti was not holding an office of profit (Emphasis supplied).

In AIR 1975 S.C. 575 (*Karbhari Bhimaji Rohamare Vs. Shanker Rao Genuji Kolhe*) the Supreme Court took a similar view and held that the petitioner who alleges that the honorarium paid to the member is a source of profit, has to discharge the burden. The facts in this case were that the official members of the Wage Board were to be paid honorarium at the rate of Rs. 25/- per day of the meeting of the Wage Board and they were also allowed to draw TA and DA. The controversy was with respect to the honorarium paid to the members of the Wage Board and it was contended that the honorarium was in fact a payment for services and was thus remuneration. It was contended that by getting honorarium the person was holding an office of profit. The learned Judges held that the payment of honorarium could not be a source of profit unless the person stayed with some friends or relatives or stayed in a Dharamshala and the person who challenged the election had failed to satisfy the test or discharge the burden pointed out in *Umrao Singh's* case (supra). It was further observed that the law regarding the question whether the person holds an office of profit should be interpreted reasonably having regards to the circumstances of the case and the time with which one is concerned as also the class of persons whose case we are dealing with and not divorced from reality.

In the present case the petitioner has nowhere alleged in his petition as to how and in what manner the respondent was holding an office of profit or was having any pecuniary gain from the office of the Director. The burden to prove that the respondent was holding an office of profit was very heavy on the petitioner and the petitioner has failed to discharge this burden.

The word 'shall' used in Article 129 of the Articles of Association does not appear to have been used in the manner in which it should have been used. These Articles are not to be construed strictly like statutes.

I have already held that no remuneration was fixed by the Board of Directors for payment to the respondent as a director and the respondent never accepted any such terms and conditions with respect to the payment of remuneration. The respondent was already a member of the Legislative Assembly of Himachal Pradesh which was dissolved on 23-1-1985. She was also a Minister of State for Rural Development. She being a member of the Himachal Pradesh Legislative Assembly (although she was also a director of HPMC) was not entitled to get any salary/remuneration in view of Article 129 (d). Thus she was not entitled and was in fact not getting any remuneration/salary till 23-1-1985. After 23-1-1985 she remained a Minister of State in the Care Taker Government and could not claim any salary/remuneration as being a director of HPMC, because she was already drawing salary as a Minister of State. There is no evidence to prove that any remuneration or salary of the respondent was fixed after 23-1-1985.

In view of the above discussion, it is held that the petitioner has failed to prove that the respondent was holding an office of profit on 8-2-1985 or on 6-3-1985 in the HPMC.

The learned counsel for the respondent also contended that Article 191 of the Constitution only disqualifies a person for being chosen as a member of the Legislative Assembly if he holds any office of profit under the Government of India or the Government of any State specified in the first Schedule. He contended that even if it is held that the office of a Director in HPMC was an office of profit, still it was not an office of profit under the Government of India or under the Government of any State specified in the First Schedule of the Constitution. He referred to the provisions of Articles 58, 66 and 102 of the Constitution and also the judgments in AIR 1969 S.C. 744 (D.R. Gurushanthappa Vs. Abdul Khuddus Anwar and others) and AIR 1981 S.C. 658 (Kona Prabhakara Rao Vs. M. Seshagiri Rao and another) in support of his contentions.

The learned counsel for the petitioner on the other hand contended that in section 3 (m) of Himachal Pradesh Act of 1971, the office of a Director and a Vice-Chairman have been specifically mentioned for the purpose of removing disqualifications and unless this Act of the State Legislature is held to be unconstitutional, the office of the Vice Chairman or Director of HPMC would be treated as offices of profit regarding which the State Act had removed the disqualification. He contends that the offices mentioned in clauses (a) to (k) of section 3 of Himachal Pradesh Act of 1971 were totally exempted from the disqualification, but the offices mentioned in section 3 (m) had a qualified restriction and the persons holding such offices were disqualified except in cases when the holder of the office was not entitled to any remuneration other than compensatory allowance.

Article 191 of the Constitution reads as follows:—

"191. *Disqualifications for Membership.*—(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State.—

- (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this Article, a person shall not be deemed to hold an office of profit under the Government of India or the Government or any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State."

In D.R. Gurushanthappa (supra) after discussing the law, the Hon'ble Judges of the Supreme Court held that the fact that the entire share capital in the company was owned by the Government did not make any difference and although all the shares were held by the Government still the company could not be treated as being equivalent to Government or to be an agent of the government so that the control exercised by its directors or managing directors could not be held to be control exercised by the Government. It was further held that under Article 191 (1) (a) of the Constitution even holding an office of profit under a Government company could not disentitle a person from contesting Legislative Assembly elections. In para 13, the learned Judges have observed that a question of piercing the veil can arise in view of the provisions of section 10 of the Act which specifically deals with disqualification for membership of persons holding offices under a Company in which a Government holds shares. That section limits the scope of disqualification to holders of three particular offices only and in companies in which the share-holding of the Government is not less than 25 per cent. This provision clearly indicates that for purposes of determining disqualification for candidature to a legislature, it would not be appropriate to attempt to lift the veil and equate a Company with the Government merely because the share-capital of the Company is contributed by the Government.

This view was subsequently approved in Kona Parabhakara Rao (supra).

In the present case although the HPMC is a Government company but it cannot be said that the directors of this company are holding an office of profit under the Government of India or the Government of Himachal Pradesh. Article 191 of the Constitution provides that the Legislature of the State can declare that certain offices would not disqualify its holder from contesting the elections. This subsequent provision of Article 191 of the Constitution need not be applied in the present case because it will only apply if the first portion of Article 191 of the Constitution is applicable. Further I have already held that the respondent was not holding an office of profit as a Vice-Chairman or a Director of HPMC and therefore, this contention does not require adjudication.

In view of the above discussion it is held that the respondent was not disqualified from contesting the elections on account of her being the director of HPMC.

The learned counsel for the petitioner further contended that the respondent was disqualified from contesting the elections under section 10 of the Act which reads as follows:—

"10. *Disqualification for office under Government Company.*—A person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share."

It was contended that the respondent was the managing agent of HPMC as defined in the Companies Act. He contended that the respondent's visit to Bangalore and Madras and the inspection of the HPMC shops etc. at those places coupled with the fact that a news item (Ex. P-1) appeared in the news paper "The Hindu" and the selling of apples from her orchards, to HPMC were sufficient proof of the fact that she was the managing agent of HPMC.

I have already dealt with the visits of the respondent to Bangalore and Madras as also tea party given to her by the persons of the news paper "The Hindu". The respondent was a Minister of State in the Himachal Pradesh State and she visited Bangalore and Madras in that capacity. She also carried out the inspections of the various units in her capacity as a State Minister. She states that tea party was given to her due to friendly relations.

Section 2 (25) of the Companies Act reads as follows:—

"2. *Definitions.*—In this Act, unless the context otherwise requires.

x x x x x

(25) "managing agent" means any individual, firm or body corporate entitled, subject to the provisions of this Act, to the management of the whole, or substantially the whole, of the affairs of a company by virtue of an agreement with the company, or by virtue of its memorandum or articles of association, and includes any individual, firm or body corporate occupying the position of a managing agent by whatever name called;

Explanation 1.—For the purpose of this Act, reference to "managing agent" shall be construed as references to any individual, firm, or body corporate who or which, was, at any time before the 3rd day of April, 1970 the managing agent of any company.

Explanation II.—For the removal of doubts, it is hereby declared that notwithstanding anything contained in section 6 of the Companies (Amendment) Act, 1969, this clause shall remain, and shall be deemed always to have remained in force."

According to Article 154 of the Articles of Association of the HPMC, the business of the company is to be managed by the Board of Directors Similarly Article 155 gives an over-all control to the Board of Directors. There is no provision of a managing agent being appointed or working for the HPMC. There is no resolution of the Board to prove that the respondent was ever appointed a managing agent by the Board of Directors of HPMC. In view of this it cannot be said that the respondent was a managing agent of HPMC in February/March, 1985. The respondent (RW 1) states that she was never the managing agent of HPMC.

In view of this it cannot be said that the respondent was disqualified from contesting the elections under section 10 of the Act.

No other point was urged before me by the learned counsel for the parties.

As a result of the above discussion, both the issues nos. 4 and 5 are decided against the petitioner.

As a result of the findings on the various issues, the present election petition is dismissed. In the facts and circumstances of the case, the parties are left to bear their own costs.

The Registrar of this Court shall intimate the authorities concerned about this decision and will also send an authenticated copy of the decision to the Election Commission in compliance with section 103 of the Representation of People Act, 1951.

March 3, 1986 (K)

Sd/-
V.P. GUPTA, J.

Attested.

Seal.

Superintendent (J) High Court of Himachal Pradesh Shimla. Sd/-